FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 111

BURTON N. PUGACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

RESPONSE TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

ISIDORE DOLLINGER,
District Attorney, Bronx County,
Attorney for Respondents.

WALTER E. DILLON,
IRVING ANOLIK,
Assistant District Attorneys,
of Counsel.

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Statement

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals, Second Circuit, rendered April 14, 1960, which affirmed a judgment of the United States District Court for the Southern District of New York (Bryan, J.) entered on the 13th day of January, 1960 denying his application for a stay and granting respondents' cross-motion to dismiss the complaint.

The Complaint and Motion for a Temporary Injunction

Petitioner, Burton N. Pugach, a citizen of New York, alleges in his complaint that respondents and their agents, after securing an order from the Supreme Court of the State of New York permitting them to tap his wires, intercepted telephonic communications, thus obtaining certain information.

It is further alleged that respondents divulged the information obtained to the Grand Jury of Bronx County, as a result of which Pugach and three others were indicted for the crimes of Maiming, Burglary, Assault and Conspiracy. In another indictment, Pugach alone, was charged with a violation of Section 1897, subd. 5a, N. Y. Penal Law (possession of a loaded gun without a written license).

Pugach believes that respondents intend to use the evidence secured from the wiretaps upon the trial of the aforementioned indictments in the County Court, Bronx County. He claims that a conviction upon a trial at which the wiretap evidence is introduced will cause him irreparable damage such as the loss of his license to practice law and the revocation of a liquor license issued by the New York State Liquor Authority, besides subjecting him to personal punishment.

Since he assumes a disclosure by respondents of the wiretap evidence at the trial of the indictments in the County Court, Bronx County, will violate Section 605 of the Federal Communications Act, petitioner demands the following relief:

1. That respondents and their agents be prohibited and enjoined from proceeding against petitioner upon the indictments in the County Court, Bronx County, "on any grounds in which they may use wiretapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wiretaps".

2. That respondents be directed to turn over to petitioner any and all wiretaps and recordings of the petitioner.

The papers in support of petitioner's motion for a temporary stay are substantially consistent with his complaint and add nothing significant thereto.

The Factual Background

Burton N. Pugach was indicted by the Grand Jury of Bronx County, charged with the crimes of Maiming, Burglary, Assault and Conspiracy, along with three other defendants. In another indictment Pugach was accused of the felonious possession of a loaded revolver. He has since been tried and convicted of the weapon violation.

The maiming count is predicated upon Pugach's alleged participation in the acid blinding of a young woman.

POINT ONE

Federal courts should not intervene in State criminal proceedings to suppress the use of evidence. The orderly presentation of a case requires that the trial court shall determine the admissibility of any evidence sought to be introduced.

In *Stefanelli* v. *Minard*, 342 U. S. 117, a parallel problem to the one at bar was presented for consideration. Justice Frankfurter, writing for the Court, declared (342 U. S. at p. 120):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced

when not merely the relations between coordinate courts but between coordinate political authorities are in issue."

• • •

"The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The wisdom of this Court's opinion in *Stefanelli* v. *Minard, supra,* has been demonstrated by the interference resulting from this action encountered by the People of the State of New York in their endeavor to prosecute criminal charges against petitioner unhindered by a determination, made in advance of the trial of the indictment, suppressing the use of evidence.

In November 1959, petitioner Pugach and three others were jointly indicted by the Grand Jury of Bronx County, State of New York, for burglary in the second degree, maiming, assault in the second degree and conspiracy. Their case was set for trial on January 7, 1960.

About two weeks before the trial was to begin and after extensive preparation had been made by the prosecu-

tion, petitioner brought the present action in the United States District Court, Southern District of New York. Together with the service of the complaint herein, petitioner noticed a formal motion for an injunction *pendente lite*. Respondents made a cross motion for the dismissal of the complaint.

The application came on to be heard before Judge Frederick Van Pelt Bryan, who then asked respondents to adjourn the State criminal trial to afford him ample time to consider the matter. In accordance with this request, the district attorney consented to a postponement of the trial in the County Court.

On January 13, 1960, Judge Bryan denied petitioner's application for the temporary injunctive relief and granted the cross-motion to dismiss the complaint.

An appeal from the judgment was then taken by petitioner to the United States Court of Appeals for the Second Circuit. On February 11, 1960, that Court (Medina and Waterman, J.J.—Madden, J. dissenting) granted a motion made by petitioner to restrain respondents, pending the determination of the appeal, from using and disclosing wiretap evidence at the trial of Pugach in the County Court, Bronx County, on the two indictments there pending against him.

On April 14, 1960, the United States Court of Appeals affirmed the judgment of the District Court and vacated the stay which had been granted on February 11, 1960.

On April 26, 1960, the United States Court of Appeals denied a rehearing but enjoined respondents from using and disclosing wiretap evidence until May 16, 1960 and provided further that if on or before said date there is filed a certificate of the Clerk of the Supreme Court that a certiorari petition, record and briefs have been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

On May 16, 1960, an *ex parte* order was granted by two Judges of the United States Court of Appeals, enlarging the time of petitioner to file the aforementioned certificate up to and including May 31, 1960.

The petition having been filed within the extended period, the injunction is presently in effect and will continue until the matter is finally determined by this Court.

As a consequence, the trial of the State criminal action against Pugach and his three co-defendants, which was to start on January 7, 1960, has been delayed for the past five months. Respondent district attorney respectfully submits that the temporary injunctions suppressing evidence which have been granted by the Federal tribunal constitute an intolerable interference with the administration of justice in the State action.

Neither the district attorney nor any one else can foresee what situation might arise in the course of the trial of the State criminal action. It is not possible to tell what the state of the evidence might be during the progress of the trial or to know how petitioners might attempt to take advantage of the fact that certain evidence has been suppressed in advance of trial.

The case of *Walder* v. *United States*, 347 U. S. 62 furnishes an example of how an accused tried to take advantage of what he believed to be a rule of law which precluded the prosecutor from challenging his false testimony by evidence secured through an unlawful search and seizure.

All rulings as to the admissibility or suppression of evidence must necessarily be made by the trial court alone, subject, of course, to review upon appeal from the judgment. There cannot be an orderly presentation of a case where such determinations are made beforehand in an abstract way.

Petitioner's only concern in the instant action has been to secure in the Federal courts temporary injunctions to prevent the speedy and effective prosecution of the criminal charges. Surprisingly enough, he has succeeded in obtaining this drastic relief upon a complaint which has been dismissed and upon unsupported allegations of fact which he could not even hope to establish at a trial.

The present action was brought for a *permanent* injunction. This relief can be granted only after a trial of this suit in the United States District Court.

Respondent district attorney respectfully asks this Court to consider the serious consequences which would flow from the trial of this action, brought, as it was in the Federal court by a defendant under indictment in a State court against the State prosecutor before the trial of the criminal charge in the State court.

To permit an action of this kind to be maintained would virtually be tantamount to a declaration that persons indicted for crime by a State government may seek in a Federal tribunal a pretrial examination of the State prosecutor as to the evidence upon which the indictment was found and as to the evidence which the district attorney intends to introduce to prove the criminal charges.

In his complaint in the instant suit, Pugach alleged that the respondent-appellees intercepted telephonic communications by tapping his telephone wires and divulged the information thus obtained to the Grand Jury of Bronx County as a result of which he and three others were indicted for the aforementioned crimes.

Petitioner further alleged in his complaint that he *believes* that respondent-appellees intend to use the evidence secured from the wiretaps upon the trial of the indictments in the County Court.

Petitioner has never inspected the grand jury minutes and actually has no knowledge as to the evidence upon which the indictment was found. It is the policy of law that grand jury proceedings be held secret and that the minutes thereof be not revealed without an order of the trial court. (Section 952-t, Code of Criminal Procedure of the State of New York; *Matter of Martin*, 170 Misc. 919; *People ex rel. Hirschberg v. Supreme Court*, 269 N. Y. 392.)

In the circumstances the petitioner cannot prove through the testimony of the district attorney his allegation that wiretap evidence was divulged to the grand jury. Indeed, the district attorney would find himself in a dilemma in even pleading to this allegation of the complaint herein.

It is to be observed that the District Judge and the Court of Appeals treated the allegation of petitioner's complaint concerning the grand jury testimony and the allegations as to the belief of petitioner that wiretap evidence will be used at the trial as though these averments had been admitted by respondents. (Petitioner's Brief, pp. 41, 42.) This assumption stemmed from the fact that respondents did not deny either allegation because they could not divulge the grand jury evidence and because the prosecutor should not be required to disclose how he intends to prove the criminal charges.

These problems and the disruptions to the State criminal action which have already occurred would be over-shadowed by those that would be created by a trial of the instant suit. The interrogation by petitioner of the district attorney and the State's witnesses at a trial of this suit, which might reasonably be expected, would cause an unbearable condition. If actions of this kind were maintainable, the effective prosecution of crime on the local level would be seriously diminished.

POINT TWO

No constitutional question is involved in the present proceeding. The Federal policy of excluding wiretap evidence is strictly a rule peculiar to trials in Federal tribunals and is not binding upon the State courts.

At the outset, this Court's attention is directed to the fact that no constitutional issue is raised upon this proceeding. In *Olmstead* v. *United States*, 277 U. S. 438, this Court clearly indicated that the tapping of telephones does not constitute a violation of either the Fourth or Fifth Amendments to the United States Constitution. In more recent opinions, such as *Rea* v. *United States*, 350 U. S. 214, *Schwartz* v. *Texas*, 344 U. S. 199 and *Benanti* v. *United States*, 355 U. S. 96, this Court consistently ruled that the Constitution of the United States does not prohibit the use of wiretap evidence in State tribunals and that convictions based thereon do not constitute a deprivation of due process of law.

The case at bar does not embrace the exercise of supervisory powers over State law enforcement agencies. Moreover, it does not involve the suppression of testimony under a rule of evidence. This Court has held that the prohibition against wiretaps is a rule of evidence peculiar to the federal judiciary and does not encompass a violation of a constitutional right. (*Benanti* v. *United States*, *supra*; *Schwartz* v. *Texas*, *supra*.)

In *Goldman* v. *United States*, 316 U. S. 129, 133, it was held that Section 605 of the Federal Communications Act was intended to protect a means of communication and not to assure the secrecy of conversation.

See:

44 Cornell L. Q. 175, 181;
Maguire v. *Amrein*, 101 F. Supp. 414.

This Court has sustained convictions where eavesdropping devices have been used which were not tantamount to wiretrapping (e.g. *Lee* v. *United States*, 343 U. S. 747; *Goldman* v. *United States*, *supra*; cf: *O'Rourke* v. *Levine* [Harlan, J.] 4 L. Ed. 2d 615, 616).

Since it is patent that the issue of wiretapping, as such, is not involved in the present proceeding but only the question of whether the Federal Courts shall enjoin the use of certain evidence in State criminal proceedings it is submitted that the cases of *Wolf* v. *Colorado*, 338 U. S. 25 and *Stefanelli* v. *Minard*, *supra*, are dispositive of this issue and the petition for certiorari should be denied.

Cf: *People* v. *Variano*, 5 N. Y. 2d 391;
Voci v. *Storb* (3 cir.) 235 F. 2d 48.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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